Jeow Fong Mei v Chong Mee Yoke

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-116 OF 1995
ABDUL MALEK, NH CHAN AND ABU MANSOR JJCA
11 DECEMBER 1995

Contract *— Sale and purchase of land — Balance of purchase price — Purchaser had three months from 14 July 1993 to make payment — A further extension of two months was given — After which sale and purchase agreement would be of no effect — Computation of time — Meaning of 'calendar month' — Whether final date for payment of balance of purchase price was 12 or 13 December 1993 — Whether vendor could terminate agreement on 13 December 1993*

The appellant ('the purchaser') in this case entered into a sale and purchase agreement ('the agreement') with the respondent ('the vendor') to purchase a house. The agreement stipulated that the balance purchase price was to be made three months from the date of notification ('the notification') by the vendor to the purchaser that the necessary approval from the relevant authority had been obtained. A further extension of two months was provided for to enable the purchaser to make the payment, after which the agreement would be of no legal effect, and the purchaser would be liable to a forfeit amounting to 10% of the purchase price. The purchaser received the notification from the respondent on 14 July 1993. Subsequently, by a letter dated 13 December 1993, the respondent terminated the agreement, claiming that the appellant had not paid the balance of the purchase price within the stipulated terms of the agreement. The appellant took action against the respondent, contending that they had up to 14 December 1993 to make the payment, and that the respondent's termination was invalid. The High Court upheld the validity of termination dated 13 December 1993. The appellant appealed. The point at issue was, what was the final date for the purchaser to pay the balance purchase price.

Held, allowing the appeal:

In computing time by calendar months, the time had to be reckoned by looking at the calendar and not by counting the days. For example, one calendar month's imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month, less one. Adopting this approach, the first three-month period for payment ended at midnight of 13 October 1993. The additional period of two months commenced on 14 October 1993, and ended on 13 December 1993. Therefore, the respondent's termination of the agreement on 13 December 1993, was invalid since the appellant had up to midnight on that date to pay (see pp 391E–H and 392B).

[Bahasa Malaysia summary

Perayu ('pembeli') dalam kes ini telah mengikat suatu perjanjian jual beli ('perjanjian tersebut') dengan penentang ('penjual') untuk membeli sebuah rumah. Perjanjian tersebut telah menyatakan bahawa bayaran baki harga belian hendaklah dijelaskan dalam tiga bulan dari tarikh pemberitahuan oleh penjual kepada pembeli, bahawa kebenaran pihak berkuasa tertentu yang diperlukan telah diperolehi ('pemberitahuan tersebut'). Suatu lanjutan masa selama dua bulan juga telah diberikan kepada pembeli untuk menjelaskan bayaran, dan selepas ini perjanjian tersebut tidak akan lagi mempunyai kesan undang-undang, dan pembeli akan dilucut hak sebanyak 10% daripada harga belian. Pembeli telah menerima pemberitahuan tersebut daripada penjual pada 14 Julai 1993. Seterusnya, menerusi sepucuk surat bertarikh 13 Disember 1993, penentang menamatkan perjanjian tersebut atas alasan bahawa perayu gagal membuat bayaran baki harga belian seperti yang dinyatakan dalam perjanjian tersebut. Perayu mengambil tindakan terhadap penentang, dan menghujah bahawa hari terakhir untuk membayar jatuh pada 14 Disember 1993, dan bahawa penamatan penentang adalah tidak sah. Mahkamah Tinggi memutuskan bahawa penamatan perjanjian yang bertarikh 13 Disember 1993 itu adalah sah. Perayu membuat rayuan. Isu utama untuk diputuskan ialah, bilakah tarikh akhir untuk perayu menjelaskan baki harga beliannya.

Diputuskan, membenarkan rayuan:

Dalam kiraan masa berdasarkan bulanan kalendar, masa hendaklah dikira berdasarkan kalendar dan bukan dengan mengira bilangan hari. Sebagai contohnya, pemenjaraan selama satu bulan kalendar harus dikira dari hari pemenjaraan sehingga hari yang mempunyai nombor yang sama dengan hari itu dalam bulan yang berikutnya, kurang satu. Menggunakan pendekatan ini, tempoh tiga bulan yang pertama untuk pembayaran berakhir pada tengah malam 13 Oktober 1993. Tempoh tambahan selama dua bulan bermula pada 14 Oktober 1993, dan berakhir pada 13 Disember 1993. Maka, penamatan perjanjian tersebut oleh penentang, adalah tidak sah kerana perayu mempunyai sehingga tengah malam pada tarikh yang sama untuk membuat pembayaran (lihat ms 391E–H and 392B).]

Notes

For cases on sale and purchase of land, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2063–2136.

Case referred to

Migotti v Colvill (1879) 4 CPD 233

Appeal from: Civil Appeal No S2-24-272-1994 (High Court, Kuala Lumpur)

Saran Singh (Saran Singh & Co) for the appellant.
N Saraswathy Devi (N Saraswathy Devi & Co) for the respondent.

Abdul Malek Ahmad J (delivering the judgment of the court): We had some difficulty in trying to convince learned counsel for the defendant, who is the respondent in this appeal, just as she appeared having a tough time attempting to persuade us, on the issue of computation of time in relation to terms stated in a contract, and we felt that we should write a short judgment to put the matter at rest.

The originating summons had arisen out of a sale and purchase agreement pertaining to a double-storey link house unit No DL15, Taman Desa Ria, Phase II, Petaling Jaya, Selangor executed on 11 August 1992 between the respondent as vendor and the plaintiff (the appellant) as purchaser for RM144,500.

The issue for determination is, what is the final date the purchaser is required to make the payment of the balance of the purchase price. The agreement is conditional, as provided under cl 1(a), upon the vendor obtaining the written approval of the appropriate authority. Among other things, cl 2 of the agreement states that the vendor shall use her best endeavours to obtain the second consent within eight months from the date of the agreement, failing which the vendor shall be entitled to an extension of one month or such further period as the parties may hereafter mutually agree to in writing.

Upon the second consent being obtained, the original copy of the same shall be deposited with the purchaser's solicitors; but, if the second consent is not obtained within the time specified, the agreement shall, at the expiration of that period, become null and void and shall cease to have any further force or effect, and such sums paid by the purchaser pursuant to the provisions of the agreement shall be refunded by the vendor to the purchaser within 30 days from the expiration of time specified without any interest or costs.

Clauses 4 and 7 of the agreement are relevant and are reproduced for effect:

> 4 In the event that the second consent is obtained within the duration as aforesaid, the balance of the purchase price being Malaysian Ringgit one hundred and thirty thousand and fifty (RM130,050) only (hereinafter referred to as 'the said balance purchase price'), shall be paid by the purchaser to Messrs Chung Chew Chan & Co, Advocates & Solicitors of No 19A, 1st Floor, Jalan SS 2/67, 47300 Petaling Jaya (hereinafter called 'the vendor's solicitors') as stakeholders within three (3) months as from the date of receipt (or deemed to have receipt) of the notification by the vendor's solicitors to the purchaser's solicitors that the second consent is obtained (hereinafter referred to as 'the completion date'), failing which the vendor shall grant the purchaser an extension of two (2) months (hereinafter referred to as 'the extended completion date') to settle the outstanding balance purchase price subject to the purchaser paying interest to the vendor at the rate of ten per cent

(10%) per annum on the balance purchase price still outstanding calculated on a daily basis (hereinafter referred to as 'the interest payment'). A

5 ...

6 ...

7 In the event that the said balance purchase price and/or the interest payment, if any, referred to in cl 4 are not paid as aforesaid, a sum equivalent to ten per cent (10%) of the purchase price shall be forfeited as liquidated damages and any sum in excess thereof paid by the purchaser to the vendor shall be refunded to the purchaser free from interest whereupon this agreement and the present sale of the said property shall be determined and shall have no further legal effect and neither party shall have any claim against the other save as to any antecedent breach. B C

According to the defendant's affidavit filed on 9 June 1994, the letter from the Pentadbir Tanah Daerah, Petaling dated 12 July 1973 had notified the defendant that her application to transfer the premises to the plaintiff had been approved by the Pihak Berkuasa Negeri. Consequent thereto, the defendant's solicitors had informed the plaintiff's solicitors that the deadline for the payment of the balance of the purchase price would fall on 12 October 1993. The stamping on the letter indicates that it was received by the purchaser's solicitors on 14 July 1993. This date is now not disputed by the defendant. D E

By cll 4 and 7 of the agreement, it is clear that the plaintiff had three, plus two, calendar months from the date of receipt of the notification to make payment of the balance of the purchase price to the defendant, failing which the agreement is considered determined with no further legal effect and a sum equivalent to 10% of the purchase price shall be forfeited as liquidated damages, and any sum in excess thereof paid by the purchaser to the vendor shall be refunded to the purchaser free from interest. F

It is only the computation of time of the five calendar months that is causing the problem. The contention of learned counsel for the plaintiff is that, since the receipt of the letter was on 14 July 1993, the time for payment expires only on 14 December 1993 and the plaintiff could still make payment on that date. The purported termination of the agreement by the defendant's letter dated 13 December 1993 was therefore, in his view, premature. G

The submission of learned counsel for the defendant was that, the computation had to be split up into two parts. For the first three months, the expiry date was 13 October 1993. When it was extended another two months, it expired on 12 December 1993. Thus the termination letter the following day. H

This argument apparently found favour with the learned judicial commissioner as she had concluded as follows: I

> According to the defendant's counsel, applying the construction of this definition to the facts of this case, three months from date of receipt of the notification of the state authority's approval by the plaintiff's solicitors,

ie 14 July 1993, would bring us to 13 October 1993. Time for completion, on the facts of this case, had been extended by two months. The last date for the plaintiff to effect payment, computing it from its expiry date of 13 October 1993, was therefore 12 December 1993.

In my judgment, the true construction of the agreement here is that the plaintiff was required to make final payment three calendar months from 14 July 1993, ie on or before 13 October 1993. From cl 4 of the agreement, failing completion on this date, the vendor is obliged to give a mandatory extension of two calendar months. The extended date of completion was, therefore, 12 December 1993. It is not disputed that the plaintiff failed to effect full payment by that date. The plaintiff had clearly bound herself under the agreement to make final payment on, or before, the extended date of 12 December 93. The plaintiff was clearly in breach of the agreement by reason of her failure or refusal to pay the balance of the purchase price on, or before, 12 December 1993. In these circumstances, I hold that there was every justification for the defendant to invoke cl 7 of the agreement, to forfeit the deposit paid and consider the agreement determined and have no further legal effect. I note that upon such determination, both parties have agreed that neither party shall have any claim against the other save as to any antecedent breach.

In these circumstances, I accordingly dismissed the plaintiff's claim with costs.

We, however, beg to disagree. As correctly stated by learned counsel for the defendant, the definition of 'calendar month' as found in *Words and Phrases Legally Defined* (2nd Ed) at p 291 is as follows:

> Calendar month
>
> The term a calendar month is a legal and technical term ... The meaning of the phrase is that, in computing time by calendar months, the time must be reckoned by looking at the calendar and not by counting days; and that one calendar month's imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month less one (*Migotti v Colvill* (1879) 4 CPD 233 at p 238 CA, per Brett LJ).

For the first three months, therefore, the period would end on 13 October 1993. But payment, as correctly stated by the learned judicial commissioner, can still be made on that date. On that premise, the extension period cannot commence on that date as the expiry will only be at midnight of that day. The commencement of the extension period can only be on 14 October 1993. This is where the learned judicial commissioner made the error in computation, as she had taken 13 October 1993 both as the date of expiry of the three-month period and the commencement date of the two-month extension.

This was when we had difficulty with the learned counsel for the defendant. She had insisted, as wrongly concluded by the learned judicial commissioner, that the extension commenced on 13 October 1993. In our considered opinion, it goes against common sense and logic for one period to end and another to commence on the same day. That would certainly

go against the principles of computation of time because of overlapping. We had even told learned counsel for the defendant that, in a case where there were 11 one-month extensions, it would end up 11 days short of a calendar year if we had followed her arguments and the conclusion of the learned judicial commissioner.

Since we found that the extension would only commence on 14 October 1993, and end on 13 December 1993, the defendant's termination letter dated 13 December 1993 was certainly one day too early as the plaintiff could still pay up to midnight on that date.

As such, the termination was obviously wrong. We had accordingly allowed the appeal with costs here and below, and granted the order in terms of prayer (a) of the originating summons by declaring that the defendant's letter of termination dated 13 December 1993 was not valid.

Appeal allowed.

Reported by Kauthar bt Ali